DEC 20 1975

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-761

JOSEPH H. DONOHUE, *Appellant,*

vs.

CITY OF SAN JOSE, a Municipal Corporation, *Appellee.*

On Appeal from the Court of Appeal of the State of California First Appellate District, Division Two

MOTION TO DISMISS APPEAL OR AFFIRM

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MOTION TO DISMISS APPEAL OR AFFIRM

Appellee, City of San Jose, moves to dismiss or affirm the above-entitled matter on the grounds that the question presented is so unsubstantial as not to need further argument.

INTRODUCTION

Appellant has not really submitted a jurisdictional statement pursuant to the United States Supreme Court Rules, but has merely retyped his Appellant's Opening Brief in the Court of Appeal of the State

of California and added two paragraphs at the end of the *"Proceedings in the Superior Court"* on pages 4-5 of his Jurisdictional Statement noting the appellate proceedings. Appellee, in its Respondent's Brief in the Court of Appeal answered and refuted the numerous issues brought up by Appellant in that Brief. Rather than repeat those arguments, particularly as to the Findings, Conclusions of Law and Admission of Evidence, in this Motion, Appellee has addressed this Motion basically to the more fundamental question of whether there is really any substantial federal question at stake in this appeal.

QUESTIONS PRESENTED

1. Does the utility tax or ordinance violate the Fourteenth Amendment by levying the tax on the persons who pay utility bills and calculated by the amount of the charges paid, and thus not collecting (a) the full amount of the tax from certain utility employees who pay at reduced rates or get free usage for a certain utility, and not collecting (b) from a lessee from an exempt entity who pays no utility taxes for a particular utility where there is no separate billing from that utility to that lessee?

2. Does the utility tax ordinance violate the Fourteenth Amendment on due process and equal protection by exempting the City, those entities exempt under the California or the United States Constitutions, and certain public entities?

3. Is the $10 monthly minimum penalty for unpaid utility taxes so excessive and arbitrary as to violate the due process and equal protection clause?

STATUTES INVOLVED

Ordinances No. 15285 and No. 15639 are set forth in the Jurisdictional Statement Appendix I.

STATEMENT OF FACTS

The utility tax of the City of San Jose levies a tax (5% during most of the period at issue) on the person paying for the telephone, gas, water and electric usage calculated upon the amount of charges billed by utility service suppliers. The tax is collected by the utility with their regular monthly bills and forwarded to the City. If a utility user refuses to pay the tax for four consecutive months, he receives a 15-day demand notice from the City. If he fails to pay the tax within the 15-day period, he is subject to a penalty of 10% of the tax due or $10.00, whichever is greater.

Exemptions in the utility tax are provided for in Section 17001 of the ordinance as follows:

> "17001. *City, Public Entity and Constitutional Exemptions.* Nothing in this Article shall be construed as imposing a tax upon (1) the City, or (2) any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of

the State of California, or (3) the State, any county, municipal corporation, city and county, district, or any political subdivision of the State of California."

ARGUMENT

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

Appellant's basic contentions are that a tax must have absolute equality and uniformity with no exemptions, and that the Appellee, City of San Jose, has the burden of establishing a compelling interest to justify the law.

Appellant is asking the Court to reverse nearly a century of decisions on the review of state taxes under the equal protection clause which put the burden on the person attacking the tax to demonstrate that there is no conceivable reasonable basis supporting the classifications in the tax.

Basically this case is merely one where the issue is whether a tax levied on persons paying for utility services is reasonable where the classification is not only a reasonable one, but having the utility collect the tax with its regular billings is the only reasonable and practical way to collect the taxes without the unreasonable administrative expense of a separate billing system.

There is really no substantial federal question as the legal issues have long been settled by this Court and the lower Court is clearly correct in determining

that there is a reasonable basis for the classification and exemptions in the utility users tax.

The penalty clause is clearly within the legislative discretion according to long established law as well as being consistent with the actual cost of collection.

II

THE BURDEN IS ON APPELLANT TO SHOW THERE IS NO REASONABLE BASIS FOR THE CLASSIFICATION

Appellant erroneously claims that the City has the burden of establishing a compelling interest that justifies the tax. The Appellant cites two recent California cases, *Curtis v. Board of Supervisor*s (1972) 7 C.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 and *Westbrook v. Mihaly* (1970) 2 C.3d 765, 87 Cal.Rptr. 839, 471 P.2d 487, vacated on other grounds (1971) 403 U.S. 915 [29 L.Ed.2d 692, 91 S.Ct. 2224], for the proposition that the compelling interest test applies to this taxation case. Both *Curtis* (majority protest of property owners to prevent incorporation of new city) and *Westbrook* (60% vote on bonds) were voting rights cases which have been deemed to be a fundamental interest requiring the strict test of equal protection. *McDonald v. Board of Education* (1969) 394 U.S. 802, 807 [22 L.Ed.2d 739, 744, 89 S.Ct. 1404]. *Dunn v. Blumstein* (1972) 405 U.S. 330, 337, [31 L.Ed. 274, 281, 92 S.Ct. 995].

However, it is clear that review of State taxation is subject to a far less stringent standard.

In *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356 [35 L.Ed.2d 351, 93 S.Ct. 100], this Court held that the equal protection clause was not violated by imposing liability for ad valorem personal property taxes on corporations and other like entities but not on individuals. The Court stated at 410 U.S. 359-360 [35 L.Ed.2d 354-355]:

> "The Equal Protection Clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others. The test whether the difference in treatment is an invidious discrimination. *(Harper v. Virginia Board of Elections,* 338 U.S. 663, 666, 16 L.Ed.2d 169, 86 S.Ct. 1079). Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-527, 3 L.Ed.2d 480, 79 S.Ct. 437:
>
> 'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of

> state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.'"

In *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734, a property tax exemption to widows but not widowers was upheld as resting "upon some grounds of difference having a fair and substantial relation to the object of the legislation."

See *Madden v. Kentucky,* 309 U.S. 83 [84 L.Ed. 590, 60 S.Ct. 406] where the State of Kentucky laid an ad valorem tax of 50% per $100 on deposits in banks outside the State and only 10 cents per $1,000 on deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court stating at 309 U.S. 88 [84 L.Ed. 593] "in taxation, even more than in other fields, legislatures possess the greatest freedom of classification." The Court in the *Madden* case added: There is a presumption of constitutionality which "can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes" and "The burden is on the one attacking the legislative arrangement to negative any conceivable basis which might support it." Ibid. The Appellant has not met his burden of proof of showing that there is no reasonable basis to support the tax.

Thus it appears that Appellant's claim that the City of San Jose utility tax offends the equal protection and due process clauses of the United States Constitution have been foreclosed by a consistent line of cases holding that where state taxation is conceived, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Lehnhausen v. Lake Shore Auto Parts* (1974) 410 U.S. 356, 359 [35 L.Ed. 2d 351, 354-55, 93 S.Ct. 1001]. "This principle has weathered nearly a century of Supreme Court adjudication." *Kahn v. Shevin* (1974) 416 U.S. 351, 355, 40 L.Ed.2d 189, 193, 94 S.Ct. 1734.

See also *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. 232, 237, 33 L.Ed. 892, 10 S.Ct. 533, *Madden v. Kentucky,* 309 U.S. 83, 87-88, 84 L.Ed. 590, 60 S.Ct. 406, 125 A.L.R. 1383, *Lawrence v. State Tax Comm'n,* 286 U.S. 276, 76 L.Ed. 1102, 52 S.Ct. 556, 87 A.L.R. 374, *Royster Guano Co. v. Virginia,* 253 U.S. 412, 64 L.Ed. 989, 40 S.Ct. 560. A long line of *California* cases are consistently and completely in line with the Supreme Court decisions on equal protection in the field of state taxation. *Stevens v. Watson* (1971) 16 C.A.3d 629, 633, 94 Cal.Rptr. 190, 192, *Roth Drug, Inc., v. Johnson* (1936) 13 C.A.2d 720, 57 P.2d 1022, *Ladd v. State Board of Equalization* (1973) 31 C.A. 3d 35, 38, 106 Cal.Rptr. 885, 887, *Clark v. City of San Pablo* (1969) 270 C.A.2d 121, 126 [75 Cal.Rptr. 726, 729].

Appellant cites no United States Supreme Court case indicating any really substantial federal question in this matter. Appellant cites *Hillsborough*

Township v. Cromwell (1946) 326 U.S. 620, 90 L.Ed. 358, 66 S. Ct. 445, which was a personal property tax assessment case based upon alleged intentional discrimination directed toward an individual. The *Hillsborough* case is not relevant to power of the State to make reasonable classifications for taxation purposes.

The gist of Appellant's argument is that the City intentionally discriminated against some 149,900 or more utility payers by allowing constitutional exemptions to certain unnamed entities. There is no evidence that the City Council knew that any utilities allowed free or reduced utility usage, or that any exempt property was leased to persons who did not pay certain utility bills. The testimony of Ferdinand Palla, then City Attorney of the City of San Jose, cited by Appellant is not part of the record in this case as it was excluded as inadmissible hearsay. Palla was available at the time of trial but was not called as a witness and his prior testimony at the Small Claims Court was denied admission (pp. 105-106).[1] California Evidence Code § 1291. Actually, the testimony of Palla cannot be construed as indicating any knowledge of any alleged discriminatory treatment and, in fact, Palla categorically denies any interest in that regard.

Essentially Appellant's claim comes down to the proposition that a tax must be absolutely equal to all persons and any deviation therefrom makes a tax unconstitutional. This is not the law under the United

[1]Page references in parentheses are to the Reporter's Transcript of the Superior Court proceedings.

States Supreme Court decisions, the California decisions, and if it were the law, would raise havoc with the intensely practical matter of taxation.

In *Ohio Oil Co. v. Conway,* 281 U.S. 146, 159, 74 L.Ed. 775, 782, 50 S.Ct. 310, Mr. Chief Justice Hughes, speaking for the Court, said:

> "The states, in the exercise of their taxing powers, as with respect to the exercise of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may grant exemptions. The state is not limited to ad valorem taxation. . . . in levying such taxes, the state is not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition, use or value. To hold otherwise, would subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our Government, and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

"[A] distinction in tax statutes between parties does not violate the equal protection clause if such distinction rests upon a rational basis. [The United States Supreme] court has said, 'Neither due process nor equal protection imposes upon a state any rigid rule of the equality of taxation . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational

basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.'" (*Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal.2d 222, 233 [45 Cal.Rptr. 869, 404 P.2d 477, 485], quoting *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 509 [81 L.Ed. 1245, 1253, 57 S.Ct. 868, 109 A.L.R. 1327]; see also *Clark v. City of San Pablo* (1969) 270 C.A.2d 121, 126 [75 Cal.Rptr. 726].)

III

LEVYING OF THE TAX ON THOSE WHO PAY FOR UTILITY SERVICE IS A REASONABLE CLASSIFICATION

The utility tax is payable by the person paying for the utility service and is calculated on the amount paid for such service. Here the legislative classification fixed the point in the economic chain at the point at which payment was made for the utility service. *Ladd v. State Board of Equalization* (1973) 31 C.A. 3d 35, 38, 106 Cal.Rptr. 885, 887. A tax on the amount paid for goods or services is a common basis of taxation, for example, sales taxes, admission taxes, federal communications tax (including local telephone services) (26 USC § 4251). The taxes are billed by the utilities with their computerized billing and a single amount paid over to the City by the supplier.

This is a reasonable classification for this taxation and it is also the only economic way to such a tax could be collected without overwhelming administrative expense. The amounts of the utility tax in many

cases are minimal. For example, the Appellant Donohue had a water bill tax of $0.39 on August 3, 1971 (Plaintiff's Exhibit 3), apparently on a $7.80 water bill. To set up a separate billing system to calculate the amount due, and send out bills to between 390,000 and 450,000 accounts per month would defeat the revenue-raising purpose which is the only object of the utility tax ordinance. The City's Finance Director testified that if the City set up its own billing system, it would cost about $6.00 per year, per customer. There are about 130,000 to 150,000 customers for each of the three major utilities, P.G. & E., San Jose Water Works, and the Pacific Telephone Co. (p. 15, line 6 to p. 16, line 3). Thus the expense could run over $2,000,000 to collect $5,000,000 a year. Under any calculation, the expense in collection if the utilities' existing billing system was not used would be unreasonably excessive. Just the postage in billing 150,000 accounts once a month would cost $180,000 per year.

The amount of San Jose Water Works employees getting free residential water was stated to be 99 (p. 99, lines 3-17). This is out of 130,000-150,000 total water company accounts, residential, industrial and commercial (p. 15, line 17, to p. 16, line 3). Certainly this is in the de minimis range. There is no evidence as to number of P.G. & E. employees who get a 25% reduction, or as to the telephone company employees who receive reduced rates. At a $10 per month water bill, these 99 water company employees would pay about $6.00 per year in utility taxes. There were no meters

on the water company employees, so there would be no way to calculate their water usage (p. 99, lines 18-26). The City has no right to force any utility to charge its employees, the Public Utility Commission having jurisdiction as to rates. See *City of Modesto v. Modesto Irrigation District* (1973) 34 C.A.3d 504, 508, 110 Cal.Rptr. 111, 113, where the Court, in upholding the right of the City of Modesto to have an irrigation district collect the utility users' tax stated:

> ". . . The power of a city operating under a home rule charter to levy a utility users' tax is a municipal affair and stems from the Constitution. (Cal. Const., art. XI §5; *Rivera v. City of Fresno, supra,* 6 Cal.3d 132, 135, 98 Cal.Rptr. 281, 282, 490 P.2d 793, 794; *West Coast Adv. Co. v. San Francisco,* 14 Cal.2d 516, 521-522 [95 P.2d 138, 143].) But, it is obvious that such city has no practical nor economical means of collecting such a tax without the cooperation of the supplier of the utility service. For example, to collect a mere 5 percent of the monthly or bi-monthly charges made by appellant districts for electrical energy supplied to city users, the city would have to audit the books and records to ascertain the exact charges made by the districts, and then the city would have to bill separately each user or the city would have to duplicate the meter reading and billing procedures of the districts or the city would have to canvass each user to find the amount charged. It seems clear to us that the cost of collection could, in many cases, exceed the tax bill and that a substantial part, if not all, of the city's tax revenue from the use

> of electrical energy by city consumers sold by ..e districts would be lost in the collection process. It is basic that the power to tax carries with it the corollary power to use reasonable means to effect its collection; otherwise, the power to impose a tax is meaningless. *(Ainsworth v. Bryant,* 34 Cal.2d 465, 476 [211 P.2d 564, 571].)"

Clearly writing the statute so as to make use of the utilities' existing billing system was a reasonable approach.

A legislative body may take into account consideration that inclusion of certain operations would unduly enhance the administrative problems of collecting the tax. *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 511, 81 L.Ed. 1245, 1254-1255, 57 S.Ct. 868; *Clark v. San Pablo* (1969) 270 C.A.2d 121, 133, 75 Cal.Rptr. 726, 733.

The fact that this tax has been adopted in this fashion by 40 California cities indicates the practicality of this mode of taxation. *Rivera v. City of Fresno* (1971) 6 C.3d 132, 134-135, 98 Cal.Rptr. 281, 282, 490 P.2d 793, 794.

IV

AMIDON v. KANE IS NOT OPPOSITE TO THIS CASE

Appellant cites the case *Tilghman v. Kane* (1971 Pa.) 279 A.2d 53 (actually reported as *Amidon v. Kane).* The *Amidon* case is solely a Pennsylvania court's interpretation of the uniformity clause of the

Pennsylvania Constitution which applies to all species of taxes rather than just to direct property taxes, as is the case in California. *Estate of Simpson* (1954) 43 C.2d 594, 597, 275 P.2d 467, 469. *Amidon* has never been cited outside of Pennsylvania. The Pennsylvania interpretation in *Amidon v. Kane* is not relevant to and wholly at variance with the standard of review of state taxation under the United States Constitution.

V

THE EXEMPTIONS ARE REASONABLE

The exemption for constitutional reasons has been applied to exempt banks and insurance companies from the tax. Article XIII, Section 14 4/5 of the California Constitution provides for a tax on gross premiums of insurance companies in lieu of all other taxation (including municipal taxes) except taxes on real property.

Article XIII, Section 27 (formerly Section 16) of the California Constitution provides for a tax on banks based on net income in lieu of all other taxation (including municipal taxation) except taxes on real property. Both of these constitutional provisions are implemented in the California Revenue and Taxation Code.

These exemptions would apply even if not set forth in the ordinance. They are part of an over-all state tax policy on bank and insurance companies which pre-empts local taxation, except real property tax-

ation. Appellant doesn't even claim those exemptions are unconstitutional under the Federal Constitution. Clearly the State has the right to set up a constitutional scheme of taxation that cannot be frustrated by municipal or other taxation contrary to that scheme.

Exempting the City is reasonable as it would merely be taking money from one pocket to another. Public entities may reasonably be exempted as they are public-supported and would merely add to the tax burden of the same taxpayers who pay the utility tax. *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 513, 81 L.Ed. 1245, 1255, 57 S.Ct. 868.

The fact that in some few cases, a bank or insurance company may pay utility bills for water and are exempt from the tax while tenants may be the actual users does not make an invidious discrimination. The tax is laid upon those who pay the utility bills. To require tenants of large buildings to install water meters to measure small amounts of water in order to collect a tax of $0.25 per month ($5.00 water bill) would be unreasonable and unrealistic. Again, this would be within the jurisdiction of the Public Utilities Commission.

Again, in the context of 130,000 to 150,000 accounts for a utility, the small number of such tenants amounts to a de minimis situation. The law disregards trifles. (California Civil Code § 3533).

The federal government and its instrumentalities are exempt from state and local taxation and this immunity goes back to *McCulloch v. Maryland* (1819)

4 Wheat. 316, 4 L.Ed. 579. See *Smith v. Davis* (1944) 323 U.S. 111, 113, 89 L.Ed. 107, 110.

The immunity of the Red Cross from state taxation as a federal instrumentality is set out in *Department of Employment v. U.S.* (1966) 385 U.S. 355, 17 L.Ed. 2d 414, 87 S.Ct. 464 (State of Colorado unemployment taxes).

See also *Western Lithograph Co. v. State Bd. of Equalization*, 11 C.2d 156, 158-159, 78 P.2d 731, 733, where the Court assumed that the federal instrumentality was not liable for sales taxes if the tax was directly on the federal instrumentality.

In *C. R. Fedrick, Inc. v. State Bd. of Equalization* (1974) 38 C.A.3d 385, 395, 112 Cal.Rptr. 598, 605, the Court states that:

> ". . . We have found no decision of the United States Supreme Court which sanctions a state tax directly on the federal government, its functions or instrumentalities."

As to the exemptions for public entities, this seems clearly within the legislative discretion. A tax upon public entities' use of utilities would be paid by the taxpayers in the City and would serve only to raise tax rates of the other entities. The persons who rent City facilities at the airport have their rental rates determined by competitive factors including utility costs (p. 92, line 19 to p. 93, line 3). Actually, all airport tenants have their own individually billed telephone service. Some airport tenants use lights or air conditioning that are provided to common areas. Only 12 lessees pay no utilities except telephone. The

other 12 lessees have their own meters and pay utility bills except for basically common area services furnished, such as air conditioning (p. 90, line 20 to p. 91, line 2; p. 91, line 25 to p. 92, line 18). At the airport, it is necessary to have common areas such as terminal waiting rooms.

VI

THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SUPPORT THE CONCLUSIONS OF LAW AND JUSTICE

Appellant's claims regarding the insufficiency of the Findings of Fact and Conclusions of Law are totally devoid of merit. Appellant does not claim any violation of federal constitutional rights in that regard. Appellant did not even attempt to meet the burden of setting out the evidence in support of the findings and trying to demonstrate that the findings were not supported by substantial evidence, pursuant to the California rule. *Nichols v. Mitchell* (1948) 32 C.2d 598, 600, 197 P.2d 550, 552; *Ames v. Ames* (1959) 68 C.A.2d 39, 40, 335 P.2d 135, 136.

In fact, the Findings of Fact were supported by substantial evidence and every exemption questioned by Appellant was explained and its exempt nature set forth. The City set forth the evidence for each of said findings cited by Appellant in its Respondent's Brief before the Court of Appeal, at pp. 41-44, which did not deem the issue as raised by Appellant substantial enough to comment on. Appellee City did not set forth herein the evidence thereon as it did

not consider the issue relevant to the question of a substantial federal question.

The rejection of the prior transcript of the Small claims proceeding was proper as there was no showing that the witnesses were not available as required by California Evidence Code §1291, and otherwise it was inadmissible hearsay.

VII

THE PENALTY FOR NON-PAYMENT OF THE TAX IS CONSTITUTIONAL

The minimum penalty of $10 is clearly within the legislative discretion. The minimum penalty for non-payment of the utility tax is clearly constitutional. It is not assessed until the utility user fails to pay for four consecutive months and he receives a 15-day demand notice from the City. The purpose of the penalty is to induce prompt payment of the utility tax and must be substantial enough to induce payment. Uncontradicted evidence established that the average cost to the City of collecting a delinquent utility tax bill was $10.20 not accounting for any legal department costs. (R.T. pp. 18-19).

Appellant has cited no case whatever upholding his position while the law from the early case of *Western Union Telegraph Co. v. State of Indiana* (1396) 165 U.S. 304, 41 L.Ed. 725, 17 S.Ct. 345, to date, clearly deems such penalties to be a matter for legislative discretion. See *Jackson v. Glenwood Springs* (1956) 122 Colo. 323, 221 P.2d 1083.

Appellant quotes Judge Nelson's comment regarding the penalty. These comments were dicta in the Small Claims Court when he transferred the case to Superior Court for lack of jurisdiction and his comments were made without any evidence of the cost of collection or of points and authorities on the issue of the penalty.

VIII

SEVERABILITY OF PENALTY

Even if the penalty were deemed so excessive as to be beyond any legislative discretion, and thus unconstitutional, the entire ordinance should not be held void, but only so much of the penalty provision as the Court deems excessive should be stricken or amended as the ordinance provided in Section 17018 for severability in case any portion of the Article setting out the utility users' tax is declared invalid. (*Ex Parte Christensen* (1890) 85 Cal. 208, 211-212, 24 Pac. 747, 748.)

IX

ABSOLUTE EQUALITY IN TAXATION IS NOT ATTAINABLE

In *L. A. Gas and Electric Corp. v. Los Angeles* (1912) 163 Cal. 621, 626-627, 126 P. 594, 597, the Court stated:

> "Absolute uniformity in the practical application of laws relating to taxation can never be attained, and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation."

In the case of *Willingham Bus Lines, Inc. v. Municipal Court* (1967) 66 C.2d 893, 898, 59 Cal.Rptr. 618, 621, 428 P.2d 602, 605-606, in approving a gross receipts tax on a charter bus line against a claim of lack of equal protection where other vehicles for hire were taxed on various other bases, the Court stated:

> "As our social and economic life grows in complexity, legislation necessarily increases in the differentiation of its techniques and in the specialization of its objections. . . . (citations omitted) . . . Now, more than ever, courts must not burden those who formulate tax policy with Procrustean requirements of absolute equality."

Particularly now when municipal financing problems are so troublesome, as evidenced by New York's recent trip to the brink of financial disaster, it is no time to change the Court's historical restricted review of state taxation.

Constitutionally this case has no particular importance. However, to the City of San Jose it represents some $5,000,000 per year, and 10% of its general fund revenues (p. 14, lines 19-23). To San Jose and at least forty other cities with the utility tax, the loss of revenue entailed by a holding that this tax is unconstitutional would be a financial disaster.

CONCLUSION

It appears that there is no substantial federal question at stake in this matter. The case is governed by a consistent line of decisions on the criteria for review of state taxation that ranges over a century and on an equally settled rule on the role of legislative discretion for penalties for non-payment of taxes.

There appears no conflict in the decisions in the United States Supreme Court or in California on such matters, and that the decision of the California Court of Appeal is clearly correct.

It is submitted that the appeal herein should be dismissed, or in the alternative, the decision of the Court of Appeal of the State of California should be affirmed without further argument.

Dated, San Jose, California,
December 17, 1975.

Respectfully submitted,

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